BEFORE THE

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Federal Communications Commission

WASHINGTON, D.C. 20554

In The Matter of	)	
	)	
Petition for Rule Making Filed by	)	
Pacific Bell Mobile Services	)	**RM-8643**
Regarding a Plan for Sharing	)	
the Costs of Microwave Relocation	)	

To: The Commission

REPLY COMMENTS OF KELLER AND HECKMAN

The law firm of Keller and Heckman, pursuant to Section 1.405 of the Rules and Regulations of the Federal Communications Commission (Commission), respectfully submits the following Reply Comments in response to the Comments filed by interested parties on the Petition for Rule Making (Petition) filed by Pacific Bell Mobile Services (PacBell), on May 5, 1995.

I. PRELIMINARY STATEMENT

1. Keller and Heckman represents numerous licensees that are authorized by the Commission to operate, among other telecommunications facilities, point-to-point microwave systems in the Private Operational-Fixed Microwave Service

("POFS") on assignments in the frequency band 1850-1990 MHz. These licensees utilize their POFS systems to serve a variety of vital point-to-point telecommunications requirements. They are directly affected by the Commission's rules, adopted in Gen. Docket 90-314 and ET Docket 92-9, that led to the reallocation of spectrum in the 2 GHz range for emerging technologies, and to the reaccommodation of the communications requirements of microwave licensees already using that spectrum. Keller and Heckman advises microwave incumbents concerning their relocation rights and the requirements of the voluntary and involuntary negotiation phases.

II. REPLY COMMENTS

2. The PacBell petition addresses the "free rider" problem that is proving to be a major impediment to negotiations between incumbent microwave licensees and PCS licensees selected to date during the voluntary negotiation period that began on April 5, 1995. To avoid disruption of their systems, microwave incumbents would like to negotiate for their entire systems, or large portions thereof, and a solution to the free rider problem would greatly facilitate such negotiations.

3. In the voluntary negotiation phase, the Commission has left the parties to free market mechanisms. After long and contentious rule making, the Commission realized that the best way to relocate systems was to allow PCS licensees to provide

incumbent microwave licensees with an incentive to voluntarily leave the band. In their comments, some PCS licensees complain to the Commission that incumbents are seeking more than just "comparable facilities." They have confused, however, their obligations during the involuntary relocation phase, which may be reached three to five years from now, with their opportunity now to give the incumbents an incentive to vacate the band. There is nothing abusive or excessive about seeking to negotiate an attractive buyout package during the voluntary negotiation period. It is exactly what the Commission intended as the best means to induce incumbents to leave the band prior to mandatory relocation.

4. The commenters unanimously supported the PacBell proposal to create "spectrum interference rights" as the method to solve the free-rider problem. There exists, however, disagreement among commenters concerning the implementation of this proposal, particularly with regard to a cap on the relocation cost or on the amount to be reimbursed to the initial PCS licensee. In addition, commenters expressed varying views as to other changes that might be made in the negotiating process.

5. To the extent that commenters seek to accomplish anything in this proceeding beyond creating spectrum interference rights, their concerns are misplaced. It would be folly at this point for the Commission to reopen the negotiation and relocation process, as some commenters have requested, under the

guise of a rule making which is designed simply to address the "free-rider" problem. If the Commission determines to amend its rules in order to remedy the free-rider problem, the Commission should limit the proceeding to that matter alone.

6. Keller and Heckman submits that it would be counter-productive to the interests of both incumbent microwave licensees and PCS licensees to revisit the established voluntary negotiation rules at this point. These rules were the product of extensive rule making proceedings and they represent a delicate balance of all opposing interests. Creating spectrum interference rights would enable the negotiating process to go forward, as intended by the Commission and within the delicate framework of the existing rules. But reopening the record to revisit the fundamental structure of the voluntary and involuntary negotiation process would create a cloud of uncertainty and bring the entire process to a complete halt.

7. Because there is unanimity among the commenters concerning the need for transferability of spectrum interference rights, Keller and Heckman recommends that the Commission consider adopting this narrow aspect of PacBell's proposal, effective immediately. Initiation of an unnecessary rule making should be avoided, since a rule making proceeding would delay the negotiations and, hence, the implementation of PCS generally.

8. To avoid rule making, the Commission could simply clarify the results of the previous rule makings to make it understood that microwave licenses include spectrum interference protection rights as well as operating rights. Exclusive licenses, such as microwave licenses, have always had two distinct components: operational rights and interference protection rights. Until now, however, it has not been necessary to differentiate between the two. Now that it is necessary, the Commission should not be reluctant to do so. A rule making proceeding is not necessary for the Commission to re-state the attributes of license authority.[1/]

9. This would not be true, however, if the commenters' various proposals for price caps, valuation formulas, and the like, were included in the Commission's interpretation. That would amount to the de facto reconsideration of issues that have already been the subject of the complete notice-and-comment cycle. It would trigger that process anew and delay the negotiations (and introduction of PCS) indefinitely.

III. CONCLUSION

10. The voluntary negotiation phase should continue to be governed by free market forces. By clarifying the transferability of spectrum interference rights, the

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[1/] See, Section 553(b)(3)(A) of the Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(A) -- notice and comment rule making is not necessary in the case of interpretative rules.

Commission would facilitate the market mechanism that it already decided was the most likely to result in the clearing of the 2 GHz band.

11. A rule making proceeding would, at the very minimum, add a year of delay to PCS implementation. The rule making would create a disincentive for PCS licensees to negotiate with incumbent microwave users, because their ultimate rights and obligations would be uncertain. This situation can be avoided, however, by clarifying the transferability of spectrum interference rights.

WHEREFORE, THE PREMISES CONSIDERED, Keller and Heckman respectfully urges the Commission to clarify its rules as suggested herein.

Respectfully submitted,

KELLER AND HECKMAN

By: Raymond A. Kowalski

Raymond A. Kowalski
John B. Richards
John Reardon
Keller and Heckman
1001 G Street
Suite 500 West
Washington, D.C. 20001
(202) 434-4100

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CERTIFICATE OF SERVICE

I, Raymond A. Kowalski, hereby certify that today, on this 30th day of June, 1995, I caused a copy of the Reply Comments of Keller and Heckman be served by first-class mail, postage prepaid to:

James P. Tuthill
Betsy Stover Granger
Pacific Bell Mobile Services
4420 Rosewood Drive
4th Floor
Pleasanton, California 94588

James L. Wurtz
Margaret E. Garber
Pacific Bell Mobile Services
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Wayne Watts, Esquire
Vice President - General Attorney
Southwestern Bell Mobile
17330 Preston Road, Suite 100A
Dallas, Texas 75252

Brenda K. Pennington, Esquire
Staff Counsel
Cellular Telecommunications Industry Association
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

Mr. Edward Jacobs
Deputy Chief, Commercial
Wireless Division
Federal Communications Comm.
2025 M Street, N.W., Room 5202
Washington, D.C. 20554

James P. Tuthill, Esquire
Betsy Stover-Granver, Esquire
4420 Rosewood Drive
4th Floor, Building 2
Pleasanton, California 94588

James L. Wurtz, Esquire
Margaret E. Garber, Esquire
Pacific Telesis Group - Wash.
1275 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20004

Regina M. Keeney, Esquire
Chief, Wireless Telecommunications Bureau
Federal Communications Comm.
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Mr. Ralph A. Haller
Deputy Chief, Wireless
Telecommunications Bureau
Federal Communications Comm.
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Mr. Gerald P. Vaughan
Deputy Chief, Wireless
TB
Federal Communications Comm.
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Mr. Bruce A. Franca
Deputy Chief, Office of
Engineering & Technology
Federal Communications Comm.
2000 M Street, N.W., Room 7002
Washington, D.C. 20554

Mr. Fred Thomas
Electronics Engineer
Office of Engineering & Technology
Federal Communications Comm.
2000 M Street, N.W., Room 480
Washington, D.C. 20554

John Cimko, Jr., Esquire
Chief, Policy Division
Wireless Telecommunications Bureau
Federal Communications Comm.
1919 M Street, N.W., Room 644
Washington, D.C. 20554

Rosalind K. Allen, Esquire
Acting Chief, Commercial
Wireless Division
Federal Communications Comm.
2025 M Street, N.W., Room 5202
Washington, D.C. 20554

Mr. Robert H. McNamara
Chief, Private Radio Division
Wireless Telecommunications Bureau
Federal Communications Comm.
2025 M Street, N.W., Room 5322
Washington, D.C. 20554

Michael Wack, Esquire
Deputy Chief, Policy Division
Wireless Telecommunications
Federal Communications Comm.
1919 M Street, N.W., Room 644
Washington, D.C. 20554

David Furth, Esquire
Deputy Chief, Commercial
Wireless Division
Federal Communications Comm.
2025 M Street, N.W., Room 5202
Washington, D.C. 20554

Thomas J. Keller, Esquire
Julia F. Kogan, Esquire
Verner, Liipfert, Bernhard,
McPherson and Hand, Chartered
901 15th Street, N.W., Suite 700
Washington, D.C. 20005

William B. Barfield, Esquire
Jim O. Llewellyn
Bellsouth Corporation
1155 Peachtree Street, S.E.
Atlanta, Georgia 30309-3610

Charles P. Featherstun, Esquire
David G. Richards, Esquire
1133 21st Street, N.W., Suite 900
Washington, D.C. 20036

Jeffrey L. Sheldon, Esquire
Sean A. Stokes, Esquire
UTC
1140 Connecticut Avenue, N.W.
Suite 1140
Washington, D.C. 20036

Cheryl Tritt, Esquire
Morrison & Foerster
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Jay C. Keithley
1850 M Street, N.W., Suite 1100
Washington, D.C. 20036

W. Richard Morris
2330 Shawnee Mission Parkway
Westwood, Kansas 66205

James P. Tuthill
Pacific Bell Mobile Services
4420 Rosewood Drive
4th Floor, Building 2
Pleasanton, California 94588

James L. Wurtz
Margaret E. Garber
Pacific Bell mobile Services
275 Pennsylvania Avenue, N.W., Suite 400
Washington, D.C. 20004

Jay Kitchen
President
Personal Communications Industry Association
1501 Duke Street
Alexandria, Virginia 22314-3450

Werner K. Hartenberger, Esquire
Laura H. Phillips, Esquire
Thomas K. Gump, Esquire
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037

Harold K. McCombs, Jr.
Janice L. Lower
Barry F. McCarthy
Michael R. Postar
Tanja M. Sonkwiler
Duncan, Weinberg, Miller & Pembroke
1615 M Street, N.W., Suite 800
Washington, D.C. 20036

Raymond A. Kowalski